No. 04-1527

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In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, THE AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL HYDROPOWER ASSOCIATION, AND THE UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

Amici (hereafter, the "Hydropower *Amici*") represent hydropower project owners and operators from across the Nation, as well as others who rely on such projects, all of whom will be directly affected by this Court's decision in this case.[1] In particular:

The Edison Electric Institute ("EEI") is the trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members serve 71 percent of all electric utility customers in the Nation and generate almost 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by the Commission. In fact, EEI members comprise the largest group of Federal Energy Regulatory Commission ("FERC" or "Commission") hydropower project license holders.

The American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper, and wood products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard and wood products. The forest products industry accounts for approximately seven percent of total U.S. manufacturing output, employs 1.1 million people, and ranks among the top ten manufacturing employers in 42 states. AF&PA

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, the Hydropower *Amici* state that no counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, their members, and their counsel made a monetary contribution to this brief.

member companies represent approximately 84 percent of the domestic paper, paperboard and market pulp production capacity, and they account for more than half of the solid wood manufacturing capacity. They own a significant portion of the nation's commercial forests and annually plant nearly half of all tree seedlings in the U.S. A significant number of AF&PA member company facilities own and operate hydroelectric dams, which power manufacturing operations at those facilities, making them largely energy-self sufficient.

The American Public Power Association ("APPA") is the trade association representing the interests of approximately 2,000 municipal and other state and local community-owned utilities throughout the United States. APPA member utilities include state public power agencies, and serve many of the Nation's largest cities. But the majority of its members are located in small and medium-sized communities in 49 states – all but Hawaii. Public power utilities serve over 14 percent of all electric utility customers in the nation. Over 21 percent of public power's total generating capacity is from hydropower, the largest percentage based on capacity of all of the utility sectors.

The National Hydropower Association ("NHA") is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry. NHA represents 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. Its membership consists of more than 140 organizations including public utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys.

The Utility Water Act Group ("UWAG") an unincorporated association of 205 individual electi companies and four national trade associations repre nting the power industry. The individual companies perate a variety of electric generating pl nts, includi ng FERC-licensed hydroelectric fa ilities, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers.

The members of the Hydropower *Amici* operate and rely on hydropower projects that FERC has licensed for energy and other benefits. The Hydropower *Amici* are concerned that in recent years, state water quality agencies increasingly have applied section 401 of the Clean Water Act ("CWA") so expansively that the state agencies are impeding hydropower projects' abilities to provide these benefits. It thus is essential that this Court make clear that the mere flow of water through an existing hydroelectric dam does not trigger section 401 of the CWA.

SUMMARY OF ARGUMENT

Hydropower projects licensed by FERC play a vital role in our Nation's energy economy and provide numerous other benefits on which the Hydropower *Amici*, their customers, and communities across the country rely. The United States derives approximately ten percent of its electricity from hydropower projects, including projects licensed by FERC. Hydropower is our Nation's largest source of renewable energy. Hydropower projects are critical to maintaining electric system reliability because of their ability to adjust quickly to changing grid conditions and their energy storage capability. The projects also

provide numerous other benefits, such as drinking and irrigation water, fish and wildlife habitat, navigation, flood control, and recreation.

Hydropower projects are extensively regulated to ensure that their operations are environmentally sound, and project owners recognize that they play an important role as stewards of the resources involved. Part I of the Federal Power Act ("FPA") charges FERC with responsibility for licensing non-federally owned hydropower projects. FERC must apply a host of statutory requirements, not only under the FPA but also under numerous other environmental and resource laws. In doing so, FERC strives to ensure that the projects produce multiple benefits and serve the overall public interest.

In recent years, however, state water quality agencies – agencies with statutory mandates different from FERC's – increasingly have used section 401 of the Clean Water Act to take control over the hydropower project licensing process. The water quality agencies often impose expansive license conditions, thereby limiting FERC's ability to manage the licensing process and impeding project benefits. Accordingly, this Court should give careful consideration to the applicability of section 401 in the hydropower licensing context. Hydropower projects should not be subject to unnecessary and duplicative regulation, particularly when not statutorily authorized.

The Maine Supreme Judicial Court in this case interpreted section 401 too broadly. Although the state court correctly construed the phrase "any discharge into" in section 401 to require an "addition" to the navigable waters before a state certification is required, the court erred in concluding that the mere flow of water through a

hydropower project creates an "addition" by temporarily changing the "control" or "ownership" of the water. The language and structure of the Clean Water Act, as well as this Court's decision in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004), dictate that the mere temporary control or ownership of water is not enough to "add" something to the navigable waters. An "addition" must introduce *something new* into navigable water. Simply moving water from one part of a water body to another, *Miccosukee* made clear, does not add anything new to the water.

Construing section 401 this way does not, as the state court erroneously believed, risk equating its scope with section 402, which is triggered only when a water project "discharges a pollutant." Section 401, properly construed, may still apply in instances when section 402 does not – namely, when a water project adds a substance to the water that is not a pollutant. But both statutory sections require as a precondition that *something* be added. The mere flow of water through a hydropower project simply does not cause any discharge to begin with.

ARGUMENT

The statutory interpretation question that this case presents does not arise in a vacuum, but rather in the context of a complex regulatory regime that has real, tangible consequences for those involved in the hydropower industry, and the communities and consumers who rely on hydropower projects. Accordingly, we first describe that regulatory regime and highlight why maintaining reasonable limits on the applicability of section 401 is so

important. We then turn directly to explain why statutory text and this Court's precedent dictate that section 401 does not apply to the mere flow of water through existing hydropower projects.

I. It Is Vitally Important To The Nation's Hydropower Resources That The Reach Of Section 401 Be Appropriately Circumscribed.

This case presents an issue of substantial importance to our industry and to the Nation: the operation of the federal regulatory regime applicable to existing, non-federally owned hydroelectric projects. Hydropower projects provide clean, renewable sources of energy and multiple other public benefits. But in recent years, state water quality agencies have increasingly applied section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341 expansively to existing hydropower projects that do not add any new substance to water bodies. Such expansive assertions of state authority intrude heavily into FERC's ability to use the federal licensing process under Part I of the FPA, 16 U.S.C. § 791a *et seq.*, to maximize the overall benefits of such projects. In addition, inappropriately applying section 401 to such projects imposes significant extra burdens on the owners of hydropower projects, the communities who depend on the projects, and others involved in the licensing process.

A. Hydropower Projects Are Important Components Of The Nation's Energy Supply And Provide Numerous Other Benefits.

Hydropower projects are critical components of the Nation's energy supply. Hydropower is a clean, domestic

energy source and our Nation's single largest renewable energy source.[2] Currently, such projects provide about ten percent of the nation's electricity.[3]

Yet hydropower projects do more than simply generate electricity. The projects help maintain the national electric system's stability; speed recovery when the electric grid is disrupted; and provide valuable base load and peaking power, thereby avoiding the need for additional power plants that rely on increasingly limited natural gas and oil supplies and other fuels. Hydropower projects also provide energy to manufacturing facilities that own and operate such projects, helping to keep our country's manufacturing base competitive in world markets. In addition to these energy-related benefits, hydropower projects provide numerous other public benefits, including improved air quality, flood control, navigation, irrigation and drinking water, fish and wildlife habitat, and recreational opportunities.

B. FERC's Licensing Authority Requires It Comprehensively To Balance The Public Benefits Of Non-Federal Hydropower Projects.

Part I of the FPA gives FERC broad licensing authority over most non-federal hydropower projects and charges FERC with ensuring that the projects can provide these benefits while fully addressing environmental issues. FPA

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[2] *See* Energy Information Administration, *Annual Energy Review 2004*, at 318, *available at* http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf.

[3] *See* Energy Information Administration, *Existing Capacity by Energy Source 2003*, *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epaxlfile2_2.xls.

section 4(e) requires FERC to give equal consideration to a host of energy, environmental, and other factors, and requires FERC to craft licenses that enable projects to provide energy and many other benefits in the public interest. 16 U.S.C. § 797(e); *see also First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 167-68 (1946) (recognizing the FPA comprehensive licensing authority and federal preemption of state licensing authority).[4]

In addition, section 10 of the FPA requires the Commission to consider the recommendations of a variety of federal and state agencies with respect to a broad spectrum of issues related to a hydroelectric project, including flood control, irrigation, water supply, recreation, and other beneficial public uses, and to ensure that the project is best adapted to a comprehensive plan for improving the waterway. *See* 16 U.S.C. § 803. In issuing new licenses for existing projects pursuant to section 15 of the FPA, the Commission also must consider additional factors to ensure that the new license is best adapted to serve the public interest, including both: (1) the applicant's plans to operate and maintain the project in a manner most likely to provide efficient and reliable service; and (2) the applicant's need for the electricity generated by the project to serve its customers. *See* 16 U.S.C. § 808.

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[4] 16 U.S.C. § 797(e) provides: "In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."

This comprehensive FERC licensing process, in combination with other applicable environmental laws such as the Endangered Species Act, 16 U.S.C. §§ 1531-44, National Environmental Policy Act, 42 U.S.C. §§ 4321-47, and Coastal Zone Management Act, 16 U.S.C. §§ 1451-65, ensures that environmental issues are fully addressed. Furthermore, the licensing process invites robust participation by state agencies and all other persons interested in deriving benefits from the projects. FERC requires license applicants to consult extensively with such agencies, and FERC itself ensures that their views are fully addressed in the ultimate licenses it issues. At the same time, "[w]hile the Commission must give 'equal consideration' to environmental factors, those factors do not have 'preemptive force.' The Commission 'still is charged with determi[n]ing the "public interest," *i.e.*, balancing power and non-power val[u]es.'" *Conservation Law Found. v. FERC*, 216 F.3d 41, 45 (D.C. Cir. 2000) (citation omitted).

C. In Recent Years, States Increasingly Have Applied Section 401 In An Expansive Manner, Eroding FERC's Ability To Strike The Proper Balance Between Energy And Environmental Values.

While the FPA requires FERC to balance energy and environmental values when licensing hydropower projects, states that invoke their authority under section 401 to review such projects do not operate under any such explicit statutory mandate. Accordingly, in the aftermath of this Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) – which upheld conditions that a state agency sought to impose under section 401 with respect to proposed construction

and operation of a *new* hydropower project where a discharge was assumed to exist – state water quality agencies have begun setting license conditions for *existing* hydropower projects under section 401 without taking into account the impacts on power or other developmental values. In many states, the section 401 process has evolved from a focused review of compliance with state water quality standards to a much more expansive parallel state licensing or permitting scheme.

Many section 401 certifications now include conditions that touch on virtually every aspect of hydropower licensing and project operations, including water flows, water levels, fish passage, fish habitat, and recreational facilities and access, as well as provisions that purport to reserve authority to reopen the certification at any time in order to require additional measures. Some states have even gone so far as to require "aesthetic" flows of water as part of a section 401 certification.[5] Furthermore, in addition to applying water quality standards under section 401, state agencies assert authority under the "other appropriate requirement" language in subsection 401(d) to impose an even broader range of procedural and substantive requirements under other state law. 33 U.S.C. § 1341(d).[6] *See also American Rivers, Inc. v. FERC*, 129 F.3d 99, 107-08 (2d Cir. 1997) (holding that state agencies need not

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[5] *See, e.g.*, Vermont Water Quality Standards, §§ 3-02 – 3-04 (2000), *available at* http://www.state.vt.us/wtrboard/july2000wqs.htm.

[6] For example, the Washington State Department of Ecology requires compliance with the state's environmental policy act in connection with a section 401 certification. That act includes additional procedural and substantive requirements to "mitigate" impacts to an extensive array of "elements of the environment." WASH. ADMIN. CODE § 197-11-440 (2005).

demonstrate to FERC that 401 conditions are within a state's authority or reasonably related to water quality).

The S.D. Warren section 401 certification is typical in this respect. It contains a host of conditions relating to water levels and flows, impoundment drawdowns and refill procedures, eel and fish passage, recreation measures, and recreational facilities as well as "reopeners" that purport to permit the state to impose additional or different requirements in the future. *S.D. Warren Co.*, 105 FERC ¶ 61,013 at 61,152 (2003).

Such conditions not only prevent FERC from crafting reasonable, balanced licenses for existing projects being licensed, but they also can directly constrain projects from producing the level of energy and other public benefits that the projects otherwise could provide. The federal courts of appeals, in the absence of guidance from this Court, have interpreted conditions that state water quality agencies impose under section 401 as mandatory conditions that FERC must include in new licenses. *See, e.g.*, *United States Dep't of the Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates.").[7] These courts of appeals have barred FERC from deleting or modifying any conditions included in a state 401 certification, even if the conditions are completely

[7] Hydropower *Amici* believe that these decisions fail to give appropriate consideration to FERC's comprehensive authority over hydropower project licensing, but FERC is following them absent contrary guidance from this Court. *See Jefferson County*, 511 U.S. at 722 (leaving open the question whether FERC may override state-imposed conditions that conflict with FERC's own assessments concerning what is in public interest).

unrelated to any adverse impact of an existing project on water quality. *American Rivers*, 129 F.3d at 107-10.

D. As A Result Of States' Expansive Use Of Section 401, Hydropower Project Benefits Have Diminished And Licensing Costs Have Risen.

As a result of state agencies' increasingly expansive use of section 401, FERC has been less able in recent years to ensure that existing hydropower projects can produce the full range of energy and other benefits the projects otherwise would provide. The projects have not been able to produce as much electricity when needed as they otherwise could have produced. Also, the projects' loss of operational flexibility has diminished their ability to maintain electric grid reliability and to provide other valuable benefits. Simply put, project owners and the public have been less able to rely on the projects for energy and other benefits when most needed.

Also, in part because of the need to accommodate parallel state water quality agency proceedings under section 401, FERC licensing process has grown dramatically more complex, costly, and time consuming. The licensing process itself – not including the cost of complying with any of the new requirements agencies impose on the licensees – often costs millions of dollars. In some recent cases, the process has cost tens of millions of dollars.[8]

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[8] FERC, *Report On Hydroelectric Licensing Policies, Procedures, & Regulations, Comprehensive Review & Recommendations Pursuant to Section 603 of the Energy Act of 2000* (May 2001), at 47-48, *available at*,

(Continued on following page)

Moreover, the licensing process now typically takes between five and ten years, and sometimes longer, which delays the implementation of new license conditions aimed at providing energy, environmental, and other benefits, including water quality improvements. According to a FERC staff report to Congress, the primary reason for delay in the issuance of hydroelectric licenses – the vast majority of which are for existing projects whose licenses are being renewed – has been state water quality agencies' inability to issue 401 certifications on a timely basis.[9] Although section 401 requires state agencies to act on a request for certification within one year, it has become a common practice for such agencies to request that licensees repeatedly withdraw and re-file such applications, thereby "restarting" the one-year clock. In one case, a state imposed such a request thirteen times.[10] If an applicant

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http://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf. *See also* Idaho Power Co., Hells Canyon Complex, FERC No. 1971, License Application (July 2003), at Executive Summary vii – viii ("[T]he Applicant initiated and completed more than 100 relicensing studies and reports a cost to date of approximately $45 million."), *available at* http://www.ferc.gov/docs-filing/elibrary.

[9] *Report On Hydroelectric Licensing Policies, Procedures, & Regulations*, *supra* note 8, at 40. According to the report, the "primary reason for delay was lack of water quality certification." *Id.* This trend continues to the present. At the Hydropower Licensing Status Workshop that FERC conducted on December 9, 2004, regarding long-delayed license applications, FERC concluded that of the 22 delayed projects reviewed, 12 were delayed in part due to lack of water quality certification. "[T]here are many reasons for delays sometimes in these licensing proceedings. And that, in many cases, maybe in most cases, it's the result of state decisions under water quality certifications." Transcript of Hydropower Licensing Status Workshop 2004, at 35, Docket No. AD04-014-000 (Dec. 9, 2004) (comments of Commissioner Kelliher).

[10] *See* Gulf Island – Deer Rips Project, Docket No. 2283, *available at* http://elibrary.ferc.gov/idmws/docketsearch.asp. Similarly, the license

(Continued on following page)

does not comply with such a request to re-file, it risks the state agency denying certification. Furthermore, even after a state agency issues a section 401 certification, affected parties sometimes file appeals, which take additional time. *See, e.g., Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234-36 (S.D. Ala. 1976) (state courts, not federal courts, are proper venue for challenging state issuance of section 401 certification).

All of this is unnecessary because states already have ample opportunities to participate in the FERC licensing process. Wholly apart from invoking section 401, states have multiple opportunities to participate actively in the FERC licensing process. The licensing process involves years of consultation with federal and state agencies and the public aimed at ensuring all concerns are raised and addressed. Indeed, notwithstanding FERC's comprehensive licensing authority, the FPA requires FERC to adopt recommendations from state fish and wildlife agencies regarding the "protection, mitigation and enhancement" of fish and wildlife "affected by" a project, unless the Commission finds that such recommendations are inconsistent with other requirements in the FPA. 16 U.S.C. § 803(j). In addition, FERC must consider the extent to which licensing a hydropower project is consistent with a state's comprehensive plan for any waterway that the project may affect. 16 U.S.C. § 803(a). Finally, states have the ability to influence the outcome of licensing proceedings by participating in the environmental review process pursuant to

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applicant for the Snoqualmie Falls Hydroelectric Project, FERC Project No. 2493, "withdrew and refiled its certification application each year from 1992 through 2003." *Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 at 62,542 n. 20 (2004).

the National Environmental Policy Act. 42 U.S.C. § 4334. States can also intervene in FERC hydroelectric license proceedings, 18 C.F.R. § 385.214, giving them the right to request rehearing and, subsequently, to request judicial review in the federal courts of appeals. 16 U.S.C. § 8251.

E. Section 401 Has Expanded Into FERC's Licensing Process Without Guidance From This Court As To Whether And, If So, When Existing Hydropower Projects Issue "Discharges."

The explosion of section 401 regulation in the context of hydroelectric licensing has occurred in the absence of any guidance from this Court concerning whether and, if so, when existing hydroelectric projects issue "discharges" that trigger the requirement for a section 401 certification. In *Jefferson County*, this Court considered section 401 in the context of the issuance of an initial license for a proposed new hydroelectric project, not the relicensing of an existing project such as the S.D. Warren project. In that earlier case, the dam builder "concede[d]" that the project would result in a "discharge" in part because it would "release . . . dredged and fill material during the construction of the project." *Jefferson County*, 511 U.S. at 711.[11]

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[11] The dam builder also conceded that the water that the dam ultimately would release at the end of its trailrace could "possib[ly]" constitute a discharge. 511 U.S. at 711. Even if this concession could be interpreted to concede that such water would *actually* constitute a discharge, it would have been immaterial in that case because the release of dredged and fill material already rendered section 401 applicable. Furthermore, uncontested legal assumptions in prior decisions do not in any way foreclose this Court from examining and rejecting those assumptions in later cases. *See, e.g., Alden v. Maine*, 527 U.S. 706, 737 (1999).

Accordingly, this Court limited itself to addressing the proper scope of state section 401 authority over the construction of a proposed project "once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 712; *see also North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997) (observing that this Court in *Jefferson County* "never attempted to define a discharge").

Therefore, this case presents the Court with an open issue of whether the mere flow of water through an existing hydroelectric project involves a "discharge" necessary to trigger section 401 certification requirements.

II. The Mere Flow Of Water Through An Existing Hydroelectric Project Is Not A Discharge Under Section 401 Of The Clean Water Act.

The question before the Court is whether the mere passage of water through an existing hydropower project being licensed by FERC involves a "discharge" into navigable waters such that a state water quality certification is required under section 401. The state court in this case correctly construed section 401 to require an "addition" to the navigable waters before a state certification is required. However, the state court erred in concluding that the mere flow of water through a hydropower project creates an "addition" because it temporarily changes the "control" or "ownership" of the water. *S.D. Warren Co. v. Board of Envt'l Protection*, 868 A.2d 210, 215-16 (Me. 2005). The language and structure of the Clean Water Act, together with this Court's decision in *Miccosukee*, 541 U.S. at 106, dictate that a "discharge" must involve an addition of *something new* to navigable water. Simply transferring water from one part of a water body to another, as *Miccosukee* made clear, does not add anything new to the water.

Accordingly, Hydropower *Amici* submit that the mere passage of water through a hydropower project does not involve any "discharge" into water that would trigger the need for a section 401 certification.

A. Discharge Requires The Addition Of A Substance Or Substances External To The Navigable Waters.

Section 401 applies only where a federally licensed activity "may result in any *discharge into* the navigable waters." 33 U.S.C. § 1341(a)(1) (emphasis added). The use of the term "discharge" – especially accompanied by the preposition "into" – suggests that the section applies only when an activity outside the water body adds something new into the water body. Had Congress intended section 401 to cover transfers of water within a single body of water, it would have used more encompassing terms, as it has in considering amendments to other sections of the CWA.[12] But it did not do so.

Other sections of the Clean Water Act confirm that "discharge" means addition of something new. It is a cardinal rule of statutory construction that the same word in different sections of an integrated statutory scheme should have the same meaning. *See, e.g., Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 (1978). The term "discharge" appears several times in the Clean

[12] For instance, in 1995, the House of Representatives passed the Clean Water Act Amendments of 1995, H.R. 961, 104th Cong. (1995), which contained comprehensive proposed amendments to the Clean Water Act. In section 803(m)(11)(A) of the bill, the House proposed to expand coverage of section 404 of the act from the current "discharge of dredged or fill material" to a more expansive "activity in wetlands or water of the United States." H.R. Rep. No. 104-112, at 83 (1995).

Water Act, and it consistently means an "addition." For example, Clean Water Act section 502(11) defines the term "discharge" as including "*discharge* of a pollutant" and "*discharge* of pollutants," which section 502(12) defines as meaning "any *addition* of any pollutant." 33 U.S.C. §§ 1362(11) & (12) (emphasis added). The definitions of "discharge of a pollutant" and "discharge of pollutants" thus squarely equate the word "discharge" with an "addition," leaving what constitutes a "pollutant" as an entirely separate question. The D.C. Circuit has observed that this equation of the term "discharge" with "addition" is "the nearest evidence of the definitional intent of Congress" with respect to the meaning of "discharge" in section 401. *North Carolina*, 112 F.3d at 1187.

Similarly, section 402 of the Clean Water Act, 33 U.S.C. § 1342, requires a National Pollutant Discharge Elimination System permit for activities that involve a "discharge of pollutants." While section 401 may be broader than section 402 in that the former applies when there is an "addition" of something, whereas the latter applies only when a "pollutant" is discharged, both sections – which sit side-by-side in the Clean Water Act – require, as a threshold condition, that some kind of "discharge" take place.

In this Court's recent *Miccosukee* decision, this Court squarely held that the word "discharge" in section 402 means the "addition" of something new. 541 U.S. at 102. *Miccosukee* concerned the question of whether a section 402 permit was required for a pump station that transferred water from a canal over a dike into a wetland area a short distance away. There was no dispute that the water that the pump station conveyed contained "pollutants" (in that case, phosphorus) as that term is defined by the CWA.

Id. Consequently, the sole issue was whether transferring water by the pumps from the canal into the wetland constituted a "discharge." *Id.* at 103.

This Court concluded that a "discharge" exists only when the water project at issue causes an "addition" to navigable water. *Id.* at 109. Even more important, this Court clarified that, when dealing with the mere transfer of water, an "addition" of "pollutants" from one water body to another occurs only when the place where the water is taken and the place where it is deposited are "meaningfully distinct water bodies." *Id.* at 112. The Court arrived at this conclusion because simply passing water from one part of a water body to another part does not "add" anything to the water body. As the Court further explained: "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 488, 492 (2d Cir. 2001)).

Finally, section 404 of the Clean Water Act, which concerns "discharge[s] of dredged or fill material," 33 U.S.C. § 1344, is triggered only when "dredged or fill material," which the Clean Water Act treats as a "pollutant," is added to the navigable waters. *Compare* 33 U.S.C. § 1344 (requiring permits for discharge of dredged or fill material) *with* 33 U.S.C. § 1342 (requiring permits for discharge of pollutants). While section 401 does not require the added substance to be dredged or fill material, it does require a "discharge," once again signifying that at least some external substance must be added to the water.

B. The Mere Flow Of Water Through A Hydropower Project Does Not Involve An Addition To The Navigable Waters.

Pursuant to the plain language of the CWA and this Court's decision in *Miccosukee*, the mere movement of water within a water body does not constitute an "addition" and, therefore, does not constitute a "discharge" under section 401.

This is precisely what occurs with respect to existing hydropower projects, such as the one at issue in this case, which pass water through the project works without adding anything to the water. In this case, the Presumpscot River flows through the projects without adding anything to the river. The river segments above and below the projects are the same body of navigable water. Therefore, under the reasoning of *Miccosukee*, no "addition" – and thus no "discharge into" the river – occurs.[13]

The D.C. Circuit's decision in *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), illustrates the soundness of this analysis. In that case, the court of appeals held that a hydropower project owner did not need to obtain a section 401 certification from the State of North Carolina in order to allow withdrawal of water from the project reservoir because the intake structure designed to remove the water would not cause any "discharge." *Id.* at 1188. According to the court of appeals, the intake

[13] Section 304(f) of the Act identifies structures such as dams that alter the flow of water as being non-point sources to be addressed through state-based non-point source programs (which are addressed under section 319 of the Act), lending further credence to the conclusion that the mere flow of water through hydropower projects does not involve a discharge under section 401. 33 U.S.C. § 1314(f)(F).

would only withdraw water and would not add anything to the project reservoir or the dam below it. *Id.* The court of appeals concluded that "the word 'discharge' contemplates the addition, not the withdrawal, of a substance or substances," so the withdrawal of water would not result in a "discharge" for the purposes of section 401. *Id.* at 1187. This reasoning is accurate and sensible, and it warrants emulation here.

Similarly, in well-settled law, the United States Environmental Protection Agency ("EPA") and the federal courts of appeals have determined that CWA section 402 does not apply to hydropower projects licensed by FERC absent an addition of external pollutants because the projects do not involve a "discharge" of pollu ants. In *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the D.C. Circuit determined that section 402 does not apply to hydropower projects absent the addition of a pollutant.[14] The key issue was whether certain dam-induced water quality changes, which the plaintiff argued constituted pollutants, should be considered "discharges" from the dam. *Id.* at 161. The court of appeals upheld EPA's view that dam-induced water quality changes did not amount to discharges because such "changes are to water *conditions*, not substances *added* to the water." *Id* at 171 (emphasis added). In other words, the D.C. Circuit explained that nothing is discharged into water unless something is added "from the outside world." *Id.* at 175.

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[14] Even in a case where such a pollutant is added, the section 402 permit is limited to addressing the discharge of that pollutant, not a more expansive set of conditions of the sort states are imposing under section 401.

Consistent with *Gorsuch*, the Sixth Circuit subsequently held that the operation of a FERC-licensed pumped storage hydropower project on Lake Michigan did not involve a "discharge" triggering the application of section 402.[15] In *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the court of appeals, just like this Court in *Miccosukee*, took it as a given that the substance that the water project was releasing into the water – there, dead fish and fish remains – were "pollutants within the meaning of the CWA." *Id.* at 583. But the Sixth Circuit held that the dam's release of the fish and remains did not constitute a discharge because it did not "add" anything to Lake Michigan "from the outside world." *Id.* at 584.[16]

If dams do not "discharge" anything as that term is used in section 402 of the Clean Water Act, it is inescapable that they do not "discharge" anything as that identical term is used in section 401. However broader section 401 may be in terms of the types of discharged substances that trigger its provisions, it cannot be any broader in terms of the requirement of a "discharge" itself.

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[15] A pumped storage project is a hydropower project where water is pumped from a lower reservoir to an upper one, where the water is stored until needed to produce electricity.

[16] The court of appeals further noted that its decision did not mean that the problem of the entrainment of fish by the pumped storage facility "will go unnoticed and unaddressed" because three separate articles of the FERC license for the project directly addressed the facility's impact on the fishery resources. *Id.* at 590. Indeed, a permanent fish barrier was ultimately installed pursuant to a settlement of fishery issues that was approved by the Commission. *Consumers Power Co.*, 74 FERC ¶ 61,055 (1996).

III. The State Court's "Ownership" Or "Control" Test Finds No Support In Law Or Logic.

Even though the Maine Supreme Judicial Court acknowledged that something must be added to water in order to trigger section 401, it determined that the hydropower projects in this case indeed added something new to the navigable waters because the project owners temporarily take "control" or "ownership" of water as it passes through the project dams. In the state court's view, the water ceases to be U.S. waters as it enters the dams, and the owner "adds" the water back to the navigable waters below the projects.

This novel analysis is simply off the mark. Nothing in section 401 or prior case law interpreting the section suggests that "ownership" or "control" of water is relevant, much less determinative, of whether the section applies to a given activity. Furthermore, this Court in *Miccosukee* made clear that moving water from one place in a water body to another does not constitute a "discharge." If temporary ownership or control – that is, temporarily removing water from a water body – were enough to constitute a discharge, *Miccosukee* would have had to come out the other way. This Court's "ladle of soup" analogy would have been impossible to make because it involves the exercise of control over water.

Moreover the state court's "ownership/control" test is based on a faulty premise. In fact, the mere passage of water through a hydropower project does not involve a change of "ownership" or "control" sufficient to make the water an "addition" to navigable waters. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (stating that "the running water in a great navigable stream is

[incapable] of private ownership. . . .") (quoting *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913)) (alteration in original).[17] Thus, the mere flow of water through a hydropower project does not involve a "discharge" necessary to trigger CWA section 401. The section does not apply to the licensing of existing projects in such circumstances.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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[17] Water rights in the West are property interests and subject to protection under State and U.S. Constitutions, but do not rise to the level of "ownership" of the water. Such rights are usufructuary – they include a right to put the water to beneficial use – but the government retains ownership of the water.